IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. — 25

CHARLES T. HVASS,

Petitioner,

vs.

THE HONORABLE HENRY N. GRAVEN, AS JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, AND THE HONORABLE EDWIN R. HICKLIN, AS JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, BY ASSIGNMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	9
Appendix — Opinion below	9
Judgment below	17

CITATIONS

CASES:

Frad v. *Kelly*, 302 U.S. 312 (1937)	7
Sunrise Mayonnaise, Inc., v. *Swift & Co*, 88 F. Supp. 187 (E.D.Pa. 1949)	8
United States v. *Brooks*, 176 F.2d 482 (4th Cir. 1949)	7
United States v. *Hvass*, 355 U.S. 570 (1958)	4
United States v. *Hvass*, 147 F.Supp. 594 (N.D.Iowa 1956)	4
United States v. *Marachowsky*, 213 F.2d 235 (7th Cir. 1954), cert. denied 348 U.S. 826 (1954)	8

STATUTES:

28 U.S.C. § 292 (b)	2, 3
28 U.S.C. § 296	2, 6, 7, 8
28 U.S.C. § 1254 (1)	1
Judicial Code of 1948, Chapter 13 (28 U.S.C. §§ 291-296)	6

MISCELLANEOUS:

Annual Report of the Director of the Administrative Office of the United States Courts, 1957, p. 123	6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on June 26, 1958.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, p. 9 *infra*, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a judge who, while sitting by designation and assignment in another district, has granted a motion to dismiss a criminal indictment on one of several available grounds, have jurisdiction, conferred by 28 U.S.C. § 296, to make final disposition of the motion on the other grounds urged in its support where, after expiration of the period for which he was designated and assigned to the district, this Court has reversed dismissal of the indictment on the ground originally relied on by the judge?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 292(b) and U.S.C. § 296, which provide as follows:

§ 292. District judges

* * * (b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

§ 296. Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, nothwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

STATEMENT

Petitioner was indicted for perjury in the Northern District of Iowa on March 20, 1956. The indictment charged that he had committed perjury in a hearing held in that court, respondent Judge Henry N. Graven presiding, pursuant to Local Rule 3 of that district. (R. 2). On March 21, 1956, Judge Graven ordered that "all proceedings" in the case be handled by Judge George T. Mickelson, of the District Court of South Dakota. (R. 10). Judge Mickelson had been designated and assigned to the Northern District of Iowa by the chief judge of the Eighth Circuit, in accordance with 28 U.S.C. § 292(b), for periods finally expiring January 1, 1957. (R. 35).

Subsequently petitioner moved to dismiss the indictment for failure to state facts sufficient to constitute an offense against the United States. (R. 28). In connection with this motion petitioner and the United States filed extensive briefs and furnished exhibits to the court, and lengthy argument was heard by Judge Mickelson on November 13, 1956. (R. 4). On December 20, 1956, Judge Mickelson filed a memorandum granting the motion to dismiss, and judgment was entered accordingly on December 27, 1956. (R. 11-18). Petitioner's principal contention had been that Local Rule 3, under which he was examined, was invalid, but Judge Mickelson did not pass on that question, saying:

> The defendant urges that Rule 3 is invalid upon several grounds and contends that his motion to dismiss the in-

dictment must be sustained for this reason. In my opinion it is not necessary for me to pass upon this question. I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury.

R. 15); *United States* v. *Hvass*, 147 F.Supp. 597 (N.D. Iowa 1956).

The United States appealed the dismissal of the indictment to this Court, under the Criminal Appeals Act, 18 U.S.C. § 3731, and this Court, holding Judge Mickelson's construction of the perjury statute to be erroneous, reversed and remanded the case to the District Court "for further proceedings not inconsistent with this opinion." *United States* v. *Hvass*, 355 U.S. 570, 578 (1958). The Court was at pains in its opinion twice to indicate that the question of the validity of Local Rule 3 was not before the Court, because of the restricted scope of appeal under the Criminal Appeals Act, and that the Court was not deciding whether or not Rule 3 is invalid for any reason. *Id.* at 574, 576.

The decision of this Court was handed down on March 3, 1958. On March 10, 1958, petitioner, after first communicating with Judge Mickelson, renewed his motion to dismiss the indictment. (R. 5). He did so by service on the United States Attorney of a motion in all respects identical to that originally made (R. 20), and a notice of motion specifying that the invalidity of Local Rule 3 would be relief on. (R. 19). The following day Judge Graven made an order reciting that respondent Judge Edwin R. Hicklin, of the Southern District of Iowa, was "the only out of district Judge who now holds a current assignment to this District," and ordering that all further proceedings in the case be handled by Judge Hicklin. (R. 21).

On March 22, 1958, the Court of Appeals granted leave to file an original civil action for writ of prohibition and mandamus against Judges Graven and Hicklin, and stayed all

proceedings in the criminal action until further order of the court. (R. 23). In the civil action a writ was sought to restrain the respondent judges from complying with the order purporting to reassign the case to Judge Hicklin, and from interfering in any way with disposition of the case by Judge Mickelson. (R. 8).

On June 26, 1958, the Court of Appeals denied the writ, ruling that the pending motion to dismiss the indictment was not a matter submitted to Judge Mickelson within the time of his assignment and designation to the Northern District of Iowa, and thus that Judge Mickelson no longer had jurisdiction to dispose of the motion.*

---

* To be entitled to the writ of prohibition, petitioner had to establish not only that Judge Mickelson has jurisdiction of the motion, but also that if he has such jurisdiction, Judge Graven lacks power to assign the case to another judge, and that the case is a proper one for issuance of an extraordinary writ. Petitioner expressly conceded below that if Judge Mickelson no longer had jurisdiction, Judge Graven's order resassigning the case was proper, and no writ should issue. The Court of Appeals, having resolved the issue of Judge Mickelson's jurisdiction adversely to petitioner, naturally ruled against him on the other issues. Thus, for example, the Court of Appeals held that it was proper for Judge Graven to assign the case to Judge Hicklin because this order merely "assigned it to the only judge aside from himself, who then had power to exercise the jurisdiction of the court." (P. 14 *infra*). These other issues do not merit review in this Court, at least on the present record. Thus if this Court should grant certiorari and hold that Judge Mickelson has jurisdiction, the case should be remanded to the Court of Appeals to consider the other issues in the light of such a holding.

REASONS FOR GRANTING THE WRIT

1. The proper construction of 28 U.S.C. § 296, defining the powers of judges sitting by designation and assignment, is a question of great importance to the administration of the federal courts. In order to permit the fullest and most efficient use of judicial manpower, Congress has provided, in Chapter 13 of the Judicial Code, 28 U.S.C. §§ 291-296, a variety of procedures by which judges of one court may be assigned to sit for a time in another court, and the services of retired judges may be utilized. These provisions are frequently used. In 1957 there were 11 assignments of circuit judges to sit in other circuits, and 26 assignments of district judges to sit outside their circuit. *Annual Report of the Director of the Administrative Office of the United States Courts, 1957*, p. 123.

Statistics are not available as to the number of assignments of district judges to sit in other districts within their circuit, or of circuit judges to hold district court, or of retired judges or justices to active duty, but it is plain that these must be very numerous. The statute involved in the present case, 28 U.S.C. § 296, applies to all these situations and defines the powers of any judge sitting in a court other than that to which he is actively commissioned. The vauable procedures for designation and assignment of judges cannot be used to their fullest potential so long as the powers of such judges are not clearly defined, or are left to varying interpretations among the circuits.

2. The decision below is contrary to the plain language of the statute. The statute expressly authorizes the judge sitting by assignment to make "decision and final disposition" of all matters submitted to him during the period for which he was assigned, and to dispose of "further proceedings in such matters." 28 U.S.C. § 296. Petitioner's motion to dismiss in 1956 challenged the sufficiency of the indictment to state an offense against the United States, and, more specifically, the validity of Local Rule 3. These are precisely the issues

now pending in the Northern District of Iowa. Until they are resolved, there will not have been any "decision and final disposition" of the matters submitted to Judge Mickelson in 1956. This Court, reversing Judge Mickelson's order of dismissal, remanded for "further proceedings not inconsistent with this opinion"; the statute entrusts such "further proceedings" to the visiting judge who has already once heard the matter. The case is quite unlike *Frad v. Kelly*, 302 U.S. 312 (1937), for there the application for termination of probation presented to the visiting judge who had presided at the trial raised legal issues never considered by the visiting judge, and turned on facts which had occurred after the assignment of the visiting judge had expired, while in the present case the motion raises an issue which has been before Judge Mickelson once and which he might have decided at that time.

3. The decision below is inconsistent with decisions of the Fourth and Seventh Circuits. The Fourth Circuit case arose out of a judgment for claimants ordered by a visiting judge in a suit under the Tort Claims Act. The Court of Appeals, thinking the Act inapplicable, reversed, but was in turn reversed by this Court, which held the Act applicable but remanded the case to the Court of Appeals to determine whether disability benefits and medical payments which the claimants had received or would receive from the government should be deducted from their recovery under the Act. On remand, the Fourth Circuit held that such deductions should be made, and remanded the case to the visiting judge, though his assignment had purportedly expired, to make findings as to the value of such payments and to enter judgment accordingly. *United States* v. *Brooks*, 176 F.2d 482 (4th Cir. 1949). Chief Judge Parker, speaking for the court, stated that such a remand to the visiting judge would "avoid unnecessary delay and duplication of effort," and that it was authorized by 28 U.S.C. § 296. *Id.* at 484.

In the Seventh Circuit case, two persons indicted for perjury were arraigned before a visiting judge on July 9th

and pleaded not guilty. The judge's assignment to the district purportedly expired on July 16th, but in October he returned to the district and presided over the trial of the defendants. On appeal from their conviction defendants contended that the visiting judge's assignment had expired, and that he had no jurisdiction to conduct the trial. The appellate court rejected this contention in a reasoned opinion, saying that the issue of guilt or innocence framed by the defendants' pleas of not guilty remained unfinished business, properly within the jurisdiction of the visiting judge, until it was finally determined by verdict and sentence. *United States* v. *Marachowsky*, 213 F.2d 235, 243-244 (7th Cir. 1954), cert. denied 348 U.S. 826 (1954). Similarly in the present case petitioner's motion to dismiss the indictment raised an issue of law as to the sufficiency of the indictment which has not yet been resolved and which is therefore within the jurisdiction of Judge Mickelson.

Also in point is *Sunrise Mayonnaise, Inc.*, v. *Swift & Co.*, 88 F.Supp. 187 (E.D.Pa. 1949), where the regular judge of a district held that he lacked jurisdiction to hear reargument of a motion which had been presented to a visiting judge, since "the particular motion which this court is asked to rule upon was in controversy and was subject to a ruling by the visiting judge at the time of his departure."

The facts in these cases are sufficiently different from those in the present case that it may be that the decisions are not technically conflicting. But it is apparent that the construction placed on 28 U.S.C. § 296 by the Eighth Circuit in the present case is far more restrictive than that of the other courts whose decisions are here noted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

GARDNER, Chief Judge.

This is an original proceeding brought by petitioner Charles T. Hvass seeking writ of prohibition and mandamus against respondents, the Honorable Henry N. Graven, as Judge of the United States District Court for the Northern District of Iowa, and the Honorable Edwin R. Hicklin, as Judge of the United States District Court for the Northern District of Iowa, by assignment.

Petitioner Hvass was on March 20, 1956, indicted in the Northern District of Iowa for perjury allegedly committed in a proceeding before Judge Graven. Thereafter, on March 21, 1956, Judge Graven entered an order assigning the case for trial to the Honorable George T. Mickelson, United States District Judge for the District of South Dakota, then

sitting in the Northern District of Iowa by assignment. Without arraignment petitioner filed a motion to dismiss the indictment on the ground that it failed to state facts sufficien to constitute an offense against the United States. On hearing of this motion Judge Mickelson sustained same and entered an order dismissing the indictment. From this order the United States perfected a direct appeal to the United States Supreme Court and in due course, on the 3rd day of March, 1958, the Supreme Court reversed the order and remanded the case to the United States District Court for the Northern District of Iowa for further proceedings. In the meantime and on January 1, 1957, Judge Mickelson's assignment to the Northern District of Iowa expired and respondent Judge Hicklin was duly assigned to the Northern District of Iowa on the 1st day of September, 1957, for a period expiring the 1st day of September, 1959. On March 11, 1958, petitioner, still without arraignment, filed a new motion to dismiss the indictment. Thereupon Judge Graven entered the following order:

> "On March 20th, 1956, when the Indictment was returned in this case the then United States District Judge for the Southern District of Iowa was disabled. He died in December, 1956. Since August, 1957, the Honorable Edwin R. Hicklin has been the United States District Judge for the Southern District of Iowa. He is the only out of district judge who now holds a current assignment to this District.
>
> IT IS, THEREFORE, ORDERED that all further proceedings in the above-entitled case will be handled by the Honorable Edwin R. Hicklin, United States District Judge for the Southern District of Iowa, with whom counsel in the case will take up all matters directly which relate to the case."

Following the entry of this order and before any proceedings had been had before Judge Hicklin, the present proceeding was commenced, seeking writ of prohibition and mandamus against respondents restraining, prohibiting and

preventing them from making, entering or enforcing, or in any manner complying with said order reassigning the case, and restraining, prohibiting and preventing them from in any manner interfering with, directly or indirectly, any further proceedings in said action or the disposition thereof by Judge Mickelson.

In this proceeding petitioner challenges the validity of the order designating Judge Hicklin to try the case on substantially the following grounds: (1) the case of *United States* v. *Hvass* is properly pending before Judge Mickelson, (2) Judge Graven lacks jurisdiction to reassign a pending case, and (3) issuance of an extraordinary writ in these circumstances is appropriate.

Judge Mickelson was designated and assigned to the Northern District of Iowa for periods finally expiring January 1, 1957. The designation was a general one * * * to hold or assist in holding the District Court of the United States in and for the several divisions of the Northern District of Iowa * * * in place or in aid of the Honorable Henry N. Graven, United States District Judge for the said Northern District of Iowa." The designation was made pursuant to statutory authority providing that:

> "The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." Section 292(b), Title 28, U.S.C.A.

The powers that may be exercised by a district judge so designated and assigned are prescribed by statute. Section 296, Title 28, U.S.C.A. The statute, after providing that a designated and assigned judge shall have all powers of a judge of the court to which he is designated and assigned, provides that:

> "A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit

or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

As herein recited, immediately following petitioner's indictment Judge Graven referred the case to Judge Mickelson who was then acting under assignment to the Northern District of Iowa. Petitioner then presented to Judge Mickelson a motion to dismiss the indictment. That motion was sustained and Judge Mickelson entered an order on the only matter submitted to him, and so far as he was concerned the case was terminated by an order of dismissal. Petitioner had not been arraigned and the question of his guilt or innocense had not been made an issue by the entrance of any plea. The assignment and designation of Judge Mickelson specifically provided that, "This assignment shall extend to cover disposition of any matters submitted during the above period of assignment." At the expiration of the period of his assignment there were no undisposed of matters which had been submitted to him during his period of assignment. The extent and limitations of the power of an assigned district judge are well defined by the United States Supreme Court in *Frad* v. *Kelly*, 302 U.S. 312, as follows:

"When an assigned judge has presided at the trial of a cause, he is to have power, though the period of his service has expired, and though he may have returned to his own district, to perform the functions which are incidental and supplementary to the duties performed by him while present and acting in the designated district. And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of the case, notwithstanding the termination of his period of service in the foreign district. But the Act goes no further.

It clearly does not contemplate that he shall decide any matter which has not been submitted to him within the designated district." (Emphasis supplied.)

The power reserved which may be exercised after the expiration of an assignment is illustrated by the decisions in *Clarke* v. *Chicago, B. & Q. R. Co.*, 10 Cir., 62 F.2d 440 and *United States* v. *Goldstein*, 8 Cir., 271 F. 838. In the instant case the motion filed by petitioner does not seek a rehearing on his prior decision, nor does he seek any further action on that motion, but he appropriately files a *new* motion recognizing that final action had theretofore been taken on his first motion. We do not think the pending motion can be said, within the purview of the statute, to present for consideration a matter submitted to Judge Mickelson within the time of his assignment and designation to the Northern District of Iowa. The decisions in *Sunrise Mayonnaise, Inc.* v. *Swift & Co.*, E.D.Pa., 88 F. Supp. 187; *United States* v. *Brooks*, 4 Cir., 176 F.2d 482; *United States* v. *Garsson*, S.D. N.Y., 291 F. 646 and *United States* v. *Marachowsky*, 7 Cir., 213 F.2d 235, relied upon by petitioner on this point, are readily distinguishable on their facts, and analysis of them would unduly lengthen this opinion and serve no useful purpose.

But it is contended that Judge Graven was without jurisdiction to reassign this case to Judge Hicklin. There is no doubt that Judge Graven was the Chief Judge of the Northern District of Iowa and as such had power to exercise whatever jurisdiction was vested in that court. Sections 136 and 137, Title 28 U.S.C.A. The effect of petitioner's contention is that this case, having once been referred to Judge Mickelson while he had power to exercise the jurisdiction of the United States District Court for the Northern District of Iowa, vested in him exclusive power to hear and determine the case. The statute is permissive in form and provides that an assigned judge, after the expiration of his assignment "*may*" act, etc. There may well be cases in which a failure of the assigned judge to act in matters submitted to him

during the time of his assignment would result in a miscarriage of justice, in which event it would be an abuse of discretion on the part of the assigned judge not to act, and there might well be circumstances under which it would be an abuse of discretion on the part of the Chief Judge not to refer the decision in such matters to the assigned judge, but there are no such circumstances apparent in the present case. Carried to its logical conclusion petitioner's contention would prevent any case once assigned to a district judge for decision and trial thereafter to be assigned to another district judge. The prevailing practice of the district judges in this circuit at least is to the contrary. See *Wisniewski* v. *United States*, 8 Cir., 247 F.2d 292; *Segal* v. *United States*, 8 Cir., 246 F.2d 814; *American Surety Co.* v. *Schottenbauer*, 8 Cir., . . . F.2d . . . . In each of these cases there were two trials, each being had before a different judge.

Jurisdiction to try petitioner's case is vested in the United States District Court for the Northern District of Iowa and it remains there notwithstanding the fact that Judge Mickelson, while assigned to the Northern District of Iowa, had power to exercise that jurisdiction. He did not, at the expiration of his period of assignment, retain or take with him out of the district the power to exercise that jurisdiction except as to matters submitted to him while he was so assigned.

It is argued that Judge Graven did not have authority to revoke the old order by which he assigned the case to Judge Mickelson for hearing. The short answer to this contention is that he did not revoke his old order nor withdraw the case from Judge Mickelson and assign it to Judge Hicklin. He merely in due course as an administrative act routinely assigned the case on his docket and assigned it to the only judge, aside from himself, who then had power to exercise the jurisdiction of the court. This is made abundantly clear by Judge Graven's memorandum opinion wherein it is said:

"It is the further view of the Court under the type of assignment referred to that the Judge of the District

> retains control of the docket of his District and the assignment of cases, subject only to the limitations that matters presently under consideration by the outside Judge should await his consideration and that reviews of his rulings and holdings should not be had.

Manifestly, the order here assailed did not affect litigation before another judge, as was the case in *United States* v. *Heath*, Hawaii, 103 F.Supp. 1, relied on by petitioner. There is no suggestion that Judge Hicklin is disqualified nor is there any doubt that he has the power to exercise, under his assignment to the Northern District of Iowa, the jurisdiction of that court, and a litigant has no vested right to have his case tried before any particular judge. In *Levine* v. *United States*, 8 Cir., 182 F.2d 556, we said:

> "But even if control over the assignment of cases were not observed by the court under the rule, the judges have inherent power to administer the business of the courts in an orderly way. Litigants have no vested right in the order in which cases are assigned for trial, and it is not contended that the judge to whom the case was assigned was in any way disqualified."

The issuance of the extraordinary writs sought in this proceeding should be confined to cases where the petitioner has an unquestioned legal right to have the performance of the particular duties sought to be enforced or enjoined. They will not be issued as a matter of right. As said by the United States Supreme Court in *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

The case of *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249, may be said to have liberalized the rule somewhat to the extent that the writs may issue in exceptional cases where

there has been a flagrant abuse of discretion by a trial judge. In *Great Northern Railway Company* v. *Hyde*, 8 Cir., 245 F.2d 537, in discussing the *La Buy* case we pointed out that:

> "The *La Buy* case, as the Supreme Court took pains to point out, presented an extreme situation of a District Judge abusing judicial power which amounted to little less than an abdiction of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

It is only in the exceptional case that the appellate court will exercise its descretion to issue such writs and we have consistently held that this discretion should be sparingly exercised. *Sound Investment & Realty Co.* v. *Harper*, 8 Cir., 178 F.2d 274; *Hydraulic Press Mfg. Co.* v. *Moore*, 8 Cir., 185 F.2d 800; *Leimer* v. *Reeves*, 8 Cir., 184 F.2d 441; *Wabash R. Co.* v. *Duncan*, 8 Cir., 170 F.2d 38. In *Sound Investment & Realty Co.* v. *Harper*, supra, we said:

> "The application is addressed to the sound judicial discretion of the court but is subject to rules of procedure governing such matters. Before the court will issue the writ it must be made to appear that the petitioner has an unquestioned legal right to have the performance of the particular duties sought to be enforced. It must also appear that petitioner has no other plain, adequate and complete method of obtaining the relief to which he is ultimately entitled. In other words, it must appear that without the issuance of the writ there will be a miscarriage of justice."

In the *Harper* case we also said:

> "The writ, however, may not be invoked as a substitute for appeal and it will not lie as a general rule where there is a remedy by appeal even in cases where such an appeal may involve inconvenience, delay or expense to the petitioner."

We do not think there are any such exceptional circumstances in this case as to require this court to exercise its

discretion. On the contrary, we think the facts rather clearly demonstrate that there is no basis for invoking the power of this court to grant the relief applied for in this proceeding.

For all the foregoing reasons the petition will be denied.

JUDGMENT BELOW

This matter came on to be heard on Petition for a Writ of Prohibition and Mandamus against the Respondents, the Honorable Henry N. Graven, as Judge of the United States District Court for the Northern District of Iowa, and the Honorable Edwin R. Hicklin, as Judge of the United States District Court for the Northern District of Iowa, by Assignment, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the said Petition for Writ of Prohibition and Mandamus in this matter be, and it is hereby denied.

June 26, 1958

FILE COPY

No. 259

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	8
Appendix A	9
Appendix B	12

CITATIONS

Cases:

Frad v. *Kelly*, 302 U.S. 312	6
La Buy v. *Howes Leather Co.*, 352 U.S. 249	7
Levine v. *United States*, 182 F. 2d 556, certiorari denied 340 U.S. 921	7
Roche v. *Evaporated Milk Assn.*, 319 U.S. 21	7
Sunrise Mayonnaise v. *Swift & Co.*, 88 F. Supp. 187	6
United States v. *Brooks*, 176 F. 2d 482	7
United States v. *Hvass*, 147 F. Supp. 594	3
United States v. *Hvass*, 355 U.S. 570	3
United States v. *Jaffe*, 98 F. Supp. 191	6
United States v. *Marachowsky*, 213 F. 2d 235, certiorari denied 348 U.S. 826	7

Statutes:

United States Code:

18 U.S.C. 3731	3
28 U.S.C. 22(c) (1940 ed., Supp. V)	6
28 U.S.C. 296	2, 5, 6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 9-17) is not yet reported. The memorandum opinion of the District Court (Appendix B, *infra*, pp. 12-16) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 17) was entered June 26, 1958. The petition for a writ of

certiorari was filed August 6, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A district judge sitting by assignment in another district had dismissed an indictment for failure to state an offense. After his assignment there had expired, this Court reversed the decision and remanded the cause for further proceedings. The case was thereupon referred to another judge sitting in that district.

The question presented is whether a new motion to dismiss the indictment had to be assigned to the judge who decided the original motion.

STATUTE INVOLVED

Title 28, United States Code, Section 296, provides in part as follows:

> Powers upon designation and assignment.
>
> * * * * *
>
> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

STATEMENT

Petitioner was indicted in the Northern District of Iowa on March 20, 1956, for perjury committed in the court of the respondent Judge Henry N. Graven (R. 2). On March 21, 1956, Judge Graven assigned the matter to Judge George T. Mickelson, a judge of the District

of South Dakota, who was then assigned to the Northern District of Iowa (R. 3, Pet. 9-10). Petitioneer filed a motion to dismiss the indictment for failure to state facts sufficient to constitute an offense against the United States (R. 3, 27). Judge Mickelson dismissed the indictment by judgment entered December 27, 1956 (R. 4), *United States* v. *Hvass*, 147 F. Supp. 594 (N. D. Iowa), holding that Rule 3 of the District Court's Rules, under which the hearing was had at which the perjury was allegedly committed, was not a law of the United States under the perjury statute. He found it unnecessary to pass on the validity of Rule 3, which petitioner had attacked. On January 1, 1957, Judge Mickelson's assignment to the Northern District of Iowa expired (Pet. 10).

Thereafter the Government appealed to this Court under the Criminal Appeals Act, 18 U.S.C. 3731. This Court on March 3, 1958, reversed the judgment of the District Court, holding that the rule was a law of the United States within the purview of the perjury statute. The Court noted that the validity of Rule 3 was not properly before it. It remanded the cause to the District Court for further proceedings not inconsistent with this opinion. *United States* v. *Hvass*, 355 U. S. 570, 578.

On March 11, 1958, the respondent Judge Graven, as chief judge of the district, entered the following order:

> On March 20th, 1956, when the indictment was returned in this case the then United States District Judge for the Southern District of Iowa was disabled. He died in December, 1956. Since August, 1957, the Honorable Edwin R. Hicklin has been the United States District Judge for the Southern

> District of Iowa. He is the only out of district judge who now holds a current assignment to this District.
>
> IT IS, THEREFORE, ORDERED that all further proceedings in the above-entitled case will be handled by the Honorable Edwin R. Hicklin, United States District Judge for the Southern District of Iowa, with whom counsel in the case will take up all matters directly which relate to the case. [R. 21].

Meanwhile, petitioner filed a new motion to dismiss the indictment (R. 6, 20).

After receiving the order of assignment, petitioner's counsel wrote Judge Graven a letter (Appendix A, *infra*, pp. 9-11) in which he indicated that he intended to raise the issue of the validity of Rule 3, and argued that, since that issue had previously been presented to Judge Mickelson, the matter should again be referred to Judge Mickelson. Judge Graven treated the letter as a motion to review the order of March 11, and filed a memorandum opinion explaining the assignment (Appendix B, *infra*, pp. 12-16). He pointed out that, customarily, matters in which the judge of the Northern District of Iowa considered himself disqualified were handled by the judge of the Southern District; that, at the time petitioner's original motion was filed, the judge of the Southern District was disabled and for that reason Judge Mickelson had been generally assigned to the Northern District; that the assignment had not been extended after November 1957 because of Judge Hicklin's appointment to the Southern District. Judge Graven noted that, after Judge Mickelson's original decision, the case was on the docket as a dismissed case; that petitioner's new motion on remand would raise

issues not passed upon by Judge Mickelson and therefore would not involve any review of Judge Mickelson's action. Under these circumstances, Judge Graven affirmed his power to assign the cause in the usual fashion to the judge of the Southern District who was fully qualified since he had had no part in the drafting of Rule 3.

Petitioner thereupon instituted the present proceeding in the Eighth Circuit Court of Appeals for a writ of prohibition and mandamus requiring Judges Graven and Hicklin to negate the assignment to Judge Hicklin (R. 7-8). The court below unanimously denied the writ, finding that the district judge "* * * merely in due course as an administrative act routinely assigned the case on his docket and assigned it to the only judge, aside from himself, who then had power to exercise the jurisdiction of the court" (Pet. 14).

ARGUMENT

1. Petitioner concedes (Pet. 5) that, if Judge Mickelson did not have jurisdiction under 28 U.S.C. 296 to decide his present motion to dismiss the indictment, his petition for a writ of mandamus was properly denied. He therefore argues that his present motion to dismiss, although a new motion after the remand of the cause by this Court, was nevertheless a continuation of the original motion which Judge Mickelson had heard, and thus a matter "submitted to him" during the period of his assignment within the meaning of 28 U.S.C. 296.

The fact that petitioner renews arguments which he presented to Judge Mickelson and which Judge Mickelson found it unnecessary to pass upon does not, however, make the present motion to dismiss a continuation of the matter presented to Judge Mickelson. Judge

Mickelson had finally disposed of the matter before him when he entered a final order dismissing the indictment. Any ruling on the present motion will not in any way involve reconsideration of Judge Mickelson's decision which this Court subsequently overruled.[1] The present posture of the case is essentially the same as where a conviction is reversed and a new trial ordered: the fact that a defendant could, at that second trial, renew arguments he made at the first would not make the second trial a continuation of the first.

2. Moreover, even assuming that Judge Mickelson could properly have been assigned to the case, such assignment was not required. 28 U.S.C. 296, as the court below noted, is permissive in form. It provides that an assigned judge, after expiration of his assignment, "may * * * decide or join in the decision and final disposition of all matters submitted * * *".[2] It, therefore, is not mandatory in its terms.

The prevailing practice in the Eighth Circuit, as pointed out below (Pet. 14), is that one judge does not have exclusive power over a case, but that many judges may have jurisdiction over various phases of a case. See also, *e.g.*, *United States* v. *Jaffe*, 98 F. Supp. 191 (D.D.C.). Even if the present motion were not so far detached from Judge Mickelson's ruling as to make assignment to him improper under 28 U.S.C. 296, it

[1] It will be, in its effect, less connected with the judge's original decision than the order terminating probation which this court held in *Frad* v. *Kelly*, 302 U.S. 312, was beyond the power of a judge whose assignment to another district had terminated.

[2] The previous statute, 28 U.S.C. 22(c) (1940 ed., Supp. V), used the word "shall" rather than "may." *Sunrise Mayonnaise* v. *Swift & Co.*, 88 F. Supp. 187 (E.D. Pa.), which held referral mandatory, is inapposite because involved there was a motion for reargument.

is sufficiently unrelated to the issues on which he ruled that, in a district having a number of judges, it would be normal procedure for the matter to come up before another judge. The remand by this Court, it may also be noted, was to the District Court, not to a particular judge.[3]

Petitioner has not attacked the qualifications of the judge to whom the case is presently assigned, and thus is in effect complaining about the mere assignment. As stated below, "* * * a litigant has no vested right to have his case tried before any particular judge" (Pet. 15). *Levine* v. *United States*, 182 F. 2d 556 (C.A. 8), certiorari denied, 340 U. S. 921.

The District Court's action in assigning the cause in the usual fashion to the judge of the Southern District of Iowa, who normally acts when the judge of the Northern District is disqualified, was therefore well within its discretion (see Pet. 13-17); and the court below was correct in holding that there was no occasion for it to review that action by the extraordinary writ of mandamus or prohibition. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21; *La Buy* v. *Howes Leather Co.*, 352 U. S. 249.

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[3] Petitioner cites *United States* v. *Brooks*, 176 F. 2d 482 (C.A. 4), as in conflict, but there the remand was to a judge, not a court, to make a further finding in a case he had heard. Likewise, *United States* v. *Marachowsky*, 213 F. 2d 235 (C.A. 7), certiorari denied, 348 U. S. 826, is not apposite because there time for trial on the issue of guilt was mutually set for a date subsequent to the expiration of the visiting judge's assignment. The court held that the visiting judge had power to act in view of his prior action in the case, not that he was required to act.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE G. GILINSKY,
Attorneys.

SEPTEMBER 1958.

APPENDIX A

March 17, 1958

Honorable Henry N. Graven,
United States District Judge,
United States Court House,
Fort Dodge, Iowa.

Re: UNITED STATES *vs.* HVASS

DEAR JUDGE GRAVEN:

I am writing this letter as amicus curiae. As you probably know, the Order of the United States Supreme Court reinstating the indictment in the above action specifically provides that the question concerning the validity of Local Rule 3 was not passed on. You may also know that the original Order of the Court dismissing the indictment failed to pass on the validity of Local Rule 3, the Court dismissing the indictment on a different ground. It is, however, pointed out in the original Order dismissing the indictment that the question of validity was presented to the trial court for its determination. At the hearing on the original Motion to Dismiss, briefs were filed by both parties to the action, and in addition exhibits were offered in evidence and received by the Court on the question of the validity of Local Rule 3.

I therefore anticipated when the case was remanded and the indictment reinstated that the question of the validity of Local Rule 3 was still before the local court. Rather than prepare a motion for a reconsideration of the question which is still before the trial court, I felt that to be on the safe side, I should prepare a new motion on behalf of the defendant moving to dismiss the indictment specifically on the ground of the invalidity of Local Rule 3.

I anticipated that this matter was probably before

the Judge to whom the motion was originally made and none other. In view of your Order of March 11, 1958, which was received by my office on March 14, 1958, it appears that the motion should be presented to a Judge of another district sitting by designation other than the Judge to whom the matter was originally assigned by your Order of March 21, 1956.

It is my understanding of 28 U.S.C. ss. 296, which provides in part:

> A justice or judge who has sat by designation and and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

which was adopted in the 1948 judicial code that the only Judge who can properly hear this motion is the one to whom the matter was originally assigned. I believe that this conclusion is well supported by the authorities construing this statute as adopted in 1948. I respectfully call the court's attention to *Sunrise Mayonnaise, Inc.* vs. *Swift & Co.*, 88 F. Supp. 187 (E.D. Pa. 1949) and *United States* vs. *Brooks*, 176 F. 2d 482 (4th Cir. 1949). It seems to me that it was the intent of Congress in expanding the scope of this particular statute to avoid a situation that now presents itself. Other decisions decided prior to 1948 that may be of help are *Hicks* vs. *United States Shipping Board Emergency Fleet Corp.*, 14 F. 2d 316 (S.D. N.Y. 1926) and *Cheesman* vs. *Hart*, 42 Fed. 98 (C.C., D. Colo. 1890).

Insofar as the power of the court to reassign a case I respectfully call your attention to *United States* vs.

Heath, 103 F. Supp. 1 (D. Hawaii 1952) and *Johnson* vs. *Manhattan Ry. Co.*, 289 U.S. 479, 503, 53 S. Ct. 721, 730 (1933).

In view of the fact that oral arguments and written briefs have heretofore been submitted to the Judge to whom the matter was originally assigned, and in view of the provisions of 28 U.S.C. ss. 296, I would sincerely appreciate it if the Court would review its Order of March 11, 1958 and inform me of its decision.

Yours very truly,

WARREN B. KING

ah
cc:

Mr. F. E. Van Alstine, Mr. M. E. Rawlings, Mr. Charles Alan Wright, Mr. Charles T. Hvass.

APPENDIX B

Memorandum and Order on Application of the Defendant to Review Order of March 11, 1958, Relating to Assignment of Further Proceedings in the Case to Judge Edwin R. Hicklin

The Court is in receipt of a letter from counsel for the defendant in which this Court is requested to review its Order of March 11th, 1958, relating to the assignment of Judge Edwin R. Hicklin of further proceedings in this case. The said letter is placed on file in the files of the case and will be regarded as an application for a review of said Order.

Memorandum

During the fourteen years that this writer has been the Judge for this District he has continually held assignments to the Southern District of Iowa, and the Judges for the Southern District of Iowa have continually held assignments to this District. During that period, with the exception hereafter noted, no out-of-state Judge has held an assignment to this District. During that period, with the exception hereafter noted, any cases pending in either District which the Judge of that District preferred not to handle have been handled by the Judge of the other District. It has always been the preference of the Judge of this Court not to handle any criminal cases in which he had handled a civil matter related to the subject matter of the criminal charge and vice versa. The practice of the Judges of the Southern District has been the same. Where the Judge of either District preferred not to handle a certain case, the long-standing practice was for the Judge of the other District to handle the same. Commencing prior to 1956 the health of the then Judge of the Southern District of Iowa began to fail and in February 1956

he became incapacitated and he died in December 1956. His successor took office in August 1957. In order that some Judge might be available to handle emergency matters arising while the Judge of this District might be out of the state temporarily, Judge George T. Mickelson of the District of South Dakota received a general assignment to this District until November 1957. The assignment was a general assignment and was not an assignment to handle any particular cases or to handle a particular term. Subsequent to the assignment three cases were filed which the Judge of this Court preferred not to handle because he had previously handled a related criminal or civil phase. Because of the incapacity of the then Judge of the Southern District of Iowa, it was not possible to follow the long-standing practice of having him handle those cases. Because of this special situation, the Judge of this Court asked Judge Mickelson to handle those cases. Two of those cases were disposed of without trial.

The record in the present case shows that on December 27th, 1956, Judge Mickelson sustained the motion of the defendant to dismiss. The motion was sustained on the ground that the oath administered in the hearing was not an oath authorized by a law of the United States. The opinion of Judge Mickelson, 147 F. Supp. 594, contains the following statement:

> "The defendant urges that Rule 3 is invalid upon several grounds and contends that his motion to dismiss the indictment must be sustained for this reason. In my opinion it is not necessary for me to pass upon this question. I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury."

From December 27th, 1956, until March 3d, 1958, the case stood on the docket of this Court as a dismissed case. On March 3d, 1958, the United States Supreme Court reversed the holding of Judge Mickelson. In the meantime the general assignment of Judge Mickelson to this District had expired in November 1957. It was not extended because in the meantime Judge Hicklin had been appointed and qualified as the Judge of the Southern District of Iowa. He was promptly given a general assignment to this District. During the period that Judge Hicklin has been the Judge of the Southern District of Iowa the Judge of this Court put in several weeks trying certain criminal cases in that District upon the request of Judge Hicklin. In April, at the request of Judge Hicklin, the Judge of this Court will try another criminal case of some length in the Southern District of Iowa.

The request of this Court to Judge Mickelson to handle the present case arose out of an emergency which emergency is now past. The Judge of this Court was of the view that such being the case a return should be had to the practice of having the Judge of the Southern District handle cases in this District which the Judge of this District prefers not to handle. Judge Hicklin has been and is willing to reciprocate for the cases handled and to be handled by the Judge of this Court in his District. Judge Hicklin had no part in the drafting or adoption of Local Rule 3 and was not aware of the existence of the present case until the Judge of this Court asked him to handle it by way of reciprocation and in accord with the long-standing practice.

It is the view of this Court that when an outside Judge receives a general assignment to a District where the assignment does not specify any particular case or court session, such outside Judge may only handle such matters as he may be requested to handle by the

Judge of the District. It is the further view of the Court under the type of assignment referred to that the Judge of the District retains control of the docket of his District and the assignment of cases, subject only to the limitations that matters presently under consideration by the outside Judge should await his consideration and that reviews of his rulings and holdings should not be had. It is the further view of the Court that the Judge of the District by virtue of his right to administer the District may withdraw from an outside Judge any pending case which has been referred to such Judge subject to the limitations noted.

In the present case Judge Mickelson in his ruling gave consideration only to the contention of the defendant referred to in his opinion. He did not give consideration to and does not have under consideration any of the matters the defendant raises by the motion filed herein on March 11th, 1958. There is no ruling or holding of Judge Mickelson which is brought up for review by that motion or which could be brought up for review by that motion or in any other way.

The Court is of the view that the posture of the present case is not such as to put it beyond this Court's inherent power of administration and supervision. The Court is of the view that it was within the discretion of this Court to assign Judge Hicklin to handle further proceedings in the present case. The reasons for the Court exercising such discretion have been heretofore stated.

The Court is of the view that the cases cited by the defendant are not apposite to the situation in this case.

ORDER

IT IS HEREBY ORDERED that the Order heretofore made by this Court on March 11th, 1958, assigning the handling of further proceedings in the present case to

Judge Edwin R. Hicklin is adhered to and the same shall remain in full force and effect.

Signed in the Northern District of Iowa this 20th day of March, 1958, for entry in the Central Division.

HENRY N. GRAVEN,
United States District Judge.

The above is a true copy.

ATTEST:

CARL V. RILEY,
Clerk.
By JANE SULLIVAN,
Deputy Clerk.

[1] U. S. GOVERNMENT PRINTING OFFICE 1958